**UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF MONTANA**

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| In re<br><br>**PAUL R. SCHMERSEY**,<br><br>Debtor. | Case No. **02-51838-7** |
| **RICHARD J. SAMSON**,<br><br>Plaintiff.<br><br>-vs-<br><br>**DOROTHY SCHMERSEY TRUST**,<br><br>Defendant. | Adv No. **03-00253** |

# MEMORANDUM OF DECISION

At Butte in said District this 24th day of June, 2005.

In this adversary proceeding the Plaintiff/Chapter 7 Trustee Richard J. Samson ("Samson") filed a complaint seeking to recover from the Defendant Dorothy Schmersey Trust[1] (hereinafter the "Trust") the sum of $266,650.33 in proceeds from the sale of real property,

[1]The Trust was substituted for Dorothy M. Schmersey, who is deceased, by Stipulation between the plaintiff and the Trust filed October 14, 2004, and approved the same date.

asserting claims for relief under theories of actual and constructive fraud under state and federal law, and as an insider preference under 11 U.S.C. § 547(b). The Trust filed an answer denying that any transfers of proceeds was made by the Debtor Paul R. Schmersey ("Paul" or "Debtor") to the Trust or to Dorothy M. Schmersey ("Dorothy"). Trial of this cause was set for April 7, 2005, at Missoula by Scheduling Order entered January 13, 2005. The parties filed a Proposed Pretrial Order on March 30, 2005, setting forth agreed facts and elements of their claims and defenses, which the Court approved the following day by Order entered March 31, 2005.

Samson appeared and testified at trial, represented by attorney James H. Cossitt ("Cossitt"). The Defendant Trust was represented by attorney Harold V. Dye ("Dye"), and Leslie R. Monroe ("Monroe") who is co-trustee and administrator of the Trust, testified, as did the Debtor's bankruptcy attorney Gregor E. Paskell ("Paskell"). Plaintiff's Exhibits ("Ex."), 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21[2], 22, 23, and Ex. 24 (Deposition of Paul's brother John F. Schmersey ("John")), and Defendant's Ex. A, B, C, D, E, F, G, H, and I, were admitted into evidence[3]. The Court took admission of Ex. 5 under advisement, and after review of the record Ex. 5 is refused admission[4]. At the conclusion of the parties' cases-in-chief

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[2]Ex. 21 was admitted only for the purpose of showing that it was given to Paskell by Paul, but not for the truth of the matters asserted therein. Ex. 21 is hearsay as defined under Fed. R. Evid. 801(c) and so not admissible under Fed. R. Evid. 802, and not subject to any exceptions under Fed. R. Evid. 803.

[3]Ex. B is identical to Ex. 2. Ex. C is identical to Ex. 4; Ex. D is the same as Ex. 3; Ex. E is the same as Ex. 6; Ex. F is the same as Ex. 7; Ex. G is the same as Ex. 8. The Court will refer herein to these exhibits numerically.

[4]In Ex. 24, p. 64, John testified that he did not recall or author the numbers on page 1 of Ex. 5, and that he authored only parts of Ex. 5. Ex. 24, pp. 64, 69-70, 77. In particular, John testified that he had never seen the entire Ex. 5 or the signatures purported to be Paul's and Judy's on the bottom of Ex. 5 or the word "accepted". Ex. 24, pp. 79, 93. Ex. 5 is dated June 7,

the Court closed the record except for review of John's deposition, Ex. 24, and took this matter under advisement. After review of the record and applicable law, this matter is ready for decision.

The parties agree this Court has jurisdiction of this adversary proceeding under 28 U.S.C. § 1334. This is a core proceeding to recover a preference and fraudulent conveyance under 28 U.S.C. § 157(b)(2)(F) and (H).

At issue is whether the Plaintiff satisfied his burden of proof to show that the Trust was a "transferee" under 11 U.S.C. § 550, of an avoidable "transfer" to the Trust for purposes of § 547(b)(2), 11 U.S.C. § 548(a)(1), and MONT. CODE ANN. ("MCA") § 31-2-333(1)(a) & (b) by means of 11 U.S.C. § 544(b)(1), when Paul transferred $266,650.33 in proceeds from the sale of real property directly to his spouse, Judy, and allegedly reached a verbal agreement with John that the $266,650.33 would be a loan to Judy from the Trust. The Trust, however, never obtained possession and control of the $266,650.33, never received a promissory note or written acknowledgment by Judy that she would pay the Trust or be responsible for payment of the $266,650.33, and Paul received no credit from the Trust or reduction in his liability to the Trust for the $266,650.33 he transferred to Judy. For the reasons set forth below, a separate Judgment shall be entered for the Defendant dismissing the complaint because Samson failed to show by a preponderance of the evidence that the Trust was a "transferee" as required for recovery from the Trust under 11 U.S.C. § 550. This Memorandum includes the Court's findings of fact and conclusions of law under F.R.B.P. 7052.

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2001, which is a month before the closing date of the sale of the Iron Horse property shown on Ex. 6. Ex. 24, p. 94. Monroe testified that he has never seen Ex. 5 before.

## FACTS

The Pretrial Order approved by the Court set forth the following agreed facts:

1. Samson is the duly appointed, qualified and acting trustee in this case;

2. The Defendant Trust is an entity with its principal place of business in Monroe, Kansas, and was established by Dorothy, the mother of Paul R. Schmersey, the Debtor herein;

3. On or about 6/12/99, the Trust advanced $75,000.00 to Paul Schmersey for the purpose of acquiring a house.

4. On or about 9/29/99, the Trust advanced $355,000.00 to Paul for the purpose of acquiring a house.

5. On or about 10/4/99, Paul acquired real estate located at 7941 Iron Horse Boulevard, West Palm Beach, FL 33412 (the "Iron Horse property") from Muriel A. Wagner via a warranty deed recorded in book 11380, page 1750;

6. The Iron Horse property was titled in the name of Paul R. Schmersey & Judy A. Schmersey;

7. In the Statement of Affairs filed in this chapter 7 case, the Debtor disclosed his sale of the Iron Horse property in "July 01" for $288,000.00;

8. On or about 7/6/01 the Iron Horse property sold for $285,000 and the Debtor and Judy Schmersey jointly netted $266,656.33[5];

9. On 6/3/02 the Judgment Debtor exam of Paul was conducted;

10. On 6/3/02 Leslie Monroe sent Paul a letter confirming the existence of various loan

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[5]This agreed figure is not identical to the amount of proceeds shown by Ex. 6 and the complaint, $266,650.33.

transactions with the Trust, Paul and Judy;

11. On 6/20/02 this Chapter 7 proceeding was commenced and on 3/28/03 a discharge was entered;

12. Dorothy M. Schmersey died on 6/26/04.

Additional background facts were developed at trial from the exhibits and testimony. John testified that he and Monroe are co-trustees of Dorothy's Trust, but that Monroe handles the Trust's administration and keeps the Trust records[6]. Ex. 24, pp. 90, 105-06. Monroe began as co-trustee of the Trust in 1995, and he testified that he acts as sole administrator of the Trust and sole custodian of the Trust records. Ex. 9, 23. The Trust documents include amendments, Ex. A dated October 11, 1991, which authorizes the trustees to pay the Grantor, i.e., Dorothy, income, sums she requests in a written instrument, or such sums "as the Trustee's may, in their discretion, determine to be reasonably necessary for Grantor's support, maintenance, comfort or other benefit, or to meet the costs of any illness or accident which may affect Grantor." Ex. A, p. 2. Later provisions of Ex. A govern matters after Dorothy's death. The Sixteenth section of Ex. A delineates the trustee's powers, including the discretionary powers, including (a)(i): "To lend money or other property to any person ....". Ex. A states that it is construed by the laws of the state of Kansas. In March of 1999, John and Monroe accepted designation as trustees and additional provisions were added for distribution. Ex. A.

The advances to Paul in 1999 were for the purpose of Paul providing lodging and life care

[6]John testified that he is a telephone repairman. Ex. 24, p. 82. Monroe testified that he is a certified public accountant ("CPA").

for his mother Dorothy in Florida at the Iron Horse property. Ex. 2, 3, 4, 19[7]. John testified that Monroe was reluctant to enter into the life care agreement. Ex. 24, p. 92. The life care agreement lasted only about a year and was terminated when Dorothy returned to Kansas in November of 2000. Ex. 24, p. 55. She was upset with Paul when she returned to Kansas. Ex. 24, pp. 52-53.

Paul and Judy moved to Bigfork, Montana, and put the Iron Horse property on the market in late 2000. John testified that at that time Paul owed the Trust the full amount of $430,000 for the advances. Ex. 24, pp. 55, 57-58. Monroe testified that when the life care agreement for Dorothy was terminated, the entire amount of advances was due, and that Paul agreed that it was due. The Iron Horse property sold and net proceeds were paid to Paul and Judy in the amount of $266,650.33, with a closing date of July 6, 2001. Ex. 6. Monroe testified that Paul sold the Iron Horse property at a "fire sale" price, and they were expecting quite a bit more. Paul received physical possession of the proceeds. Ex. 24, pp. 80, 86. He never relinquished them.

Paul wanted to borrow the $266,650.33 proceeds from the sale of the Iron Horse property, and in 2001 asked John, but John refused. Ex. 24, pp. 54-55, 61, 64, 73, 76, 102. John testified that he believed Paul had no intention of paying back the Trust, and John wanted to protect his mother and the Trust. Ex. 24, pp. 56[8], 78-79, 82-83. John testified that, as a member of the Trust, he agreed to Paul's request that the Trust would loan Paul's spouse Judy the proceeds from

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[7]Ex. 19 is undated, but refers to an agreement reached at Les [Monroe's] office in May. Ex. 4 refers to an agreement modification dated in May, 1999.

[8]John testified: "I guess I could almost see the handwriting on the wall now is [sic] this isn't going to come back to the trust. He has no intentions of paying this back to the trust." Ex. 24, p. 56.

the sale of the Iron Horse property, and Judy told John she would repay the loan. Ex. 24, pp. 62, 66, 87-88, 102. John testified that he agreed for the Trust to loan Judy $200,000. Ex. 24, pp. 71, 79. Ex. 7 is an undated letter authored by John to Monroe stating that in July of 2001, John authorized a personal loan to Judy "using the proceeds of the $266,650.30 [sic][9]". Monroe testified that he did not learn about John's agreement until June of 2002, when Paul told him about it over the phone. Ex. 23 is Monroe's affidavit, and he states therein at paragraph 14 that he received Ex. 7 by facsimile shortly before June 3, 2002, and he replied with Ex. 8.

John testified that the Trust did not advance any new money to Judy, rather the $200,000 loan was from the Iron Horse property proceeds already in Paul's and Judy's possession. Ex. 24, pp. 75, 80, 88. John felt that with Judy's signature on a loan for the proceeds he could possibly get it back from her. Ex. 24, p. 82. But he never obtained Judy's signature. According to John the transaction was never more than verbal, and Judy agreed to repay the Trust after a lawsuit involving Paul was concluded. Ex. 24, pp. 75, 77. Judy never signed a promissory note for the $200,000. Ex. 24, p. 79. John testified that, as a result of his agreement, in John's opinion Paul owed $230,000 after the agreement with Judy, and she owed $200,000. Ex. 20; Ex. 24, pp. 80-81. However, John later clarified that Ex. 20 was his opinion only, that Paul was not forgiven or credited by the Trust for the $200,000 loaned to Judy, and that Paul still owes the Trust the entire $430,000. Ex. 24, pp. 82-84, 107. Samson testified that he did not know when Judy and Paul agreed that she would borrow the sale proceeds, or the specific date of the alleged "transfer".

Ex. 8 is a letter from Monroe to Paul and Judy dated June 3, 2002, in which Monroe, after

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[9]Ex. 7 differs from Ex. 6 in stating the amount of proceeds, but only by $.03. John still believed the loan amount was $200,000. Ex. 24, p. 86.

summarizing the original life care agreement between Paul and Dorothy and the voiding of that agreement states: "In June, 2001[10], John (with your Mother's consent, as I understand it) agreed to allow the proceeds from the sale to be considered as a loan to Judy to allow you to get re-established in Montana. The net proceeds from the house sale in Florida was $266,650. Your Mother's records as of this date still reflect the advances as being due." Monroe testified that he did not learn of John's decision to loan Judy the proceeds until Paul told him shortly before he drafted Ex. 8. As sole administrator of the Trust and co-trustee, Monroe testified that the Trust did not loan the sale proceeds to Judy, and that no loan to Judy is carried on the Trust's books. Monroe testified that Ex. 8 is his memo to Paul and Judy reciting what Paul and Judy think about their transaction with John, but that the last sentence of Ex. 8 repeats that Dorothy's records still reflect the entire advance as being due.

Monroe noted on the Trust's records that Paul owes the entire $430,000 advanced to him by the Trust for Dorothy's lodging and life care, with a parenthetical notation that $266,650 "may be owed by Judy". Ex. 9, I. Monroe explained on Ex. 9 that the Trust's records carry Paul's obligation in this manner: "(a) I have never received any verification that Judy Schmersey assumed liability for the $266,650.33 received from the sale of the Ironhorse property and (b) I am unsure of the legal consequences arising from the voiding of the agreement for Paul Schmersey to provide lifetime quarters for Dorothy Schmersey in 2002[11]." Ex. 9 & 23, p. 3, paragraph 15. Monroe testified at the hearing that he still has received no verification from Judy

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[10]This date conflicts with Ex. 7 and other evidence which puts the date of the loan as of July of 2001. Samson testified he did not know the date.

[11]Monroe testified that Paul probably owes something less than the $430,000 for the limited amount of life care Paul provided Dorothy, but that number has not been quantified.

that she owes the Trust for the $266,650.33 in proceeds.

The Trust's records include financial records admitted as Ex. 18[12], the second page of which is a summary of assets through December 31, 2003, listing as an asset $430,000 owed by Paul labeled "life use fee". Ex. 18 does not list a loan receivable from Judy. Ex. I is a summary of the Trust's assets from June 26, 2004, to November 30, 2004, and includes the parenthetical under Paul's $430,000 "life use fee": "(Paul says amount owing is from Judy and in amount of $266,650)." On cross examination, Monroe testified that among other loans made by the Trust, such as to John, some were definitely documented, but he was not sure the same was true of all loans.

Samson testified that he believes the $430,000 which Paul owed the Trust would have been reduced by the amount of loan proceeds loaned to Judy, but he offered no evidence which showed such a reduction by the Trust in its records. Monroe, the sole custodian of Trust records, testified that the sale proceeds were never paid to the Trust, and that Paul never repaid a penny of the $430,000 advances. Monroe testified that he did not know whether Judy even received the sale proceeds.

At times John made demands to Paul verbally and by email to repay the Trust. Ex. 24, p. 106; Ex. 12. Paul never repaid any of the $430,000 in advances to the Trust, and did not transfer any of the proceeds from the sale of the Iron Horse property to the Trust. Ex. 9 & 23, pp. 3-4, paragraphs 15, 16, 17; Ex. 24, pp. 66, 72-73, 100; Ex. 9, paragraphs 16, 17. Nonetheless, John testified that Paul feels he does not owe the Trust anything because his mother broke the life care agreement when she moved back to Kansas and his expenses were more than expected. Ex. 24,

[12]Ex. 18 also includes financial records of the Arthur G. Schmersey Revocable Trust.

pp. 89.

The Debtor filed his Chapter 7 bankruptcy petition, Schedules and Statements on June 19, 2002, admitted as Ex. 22, listing assets of $326,416.81 and liabilities of $1,537,794.91. The Trust was not listed as a creditor, and was not sent the Notice of Commencement of Debtor's case. Samson testified that Paul did not disclose the existence of the Trust at a judgment debtor examination of Paul or his § 341(a) meeting. The Trust did not file a Proof of Claim. On his Statement of Financial Affairs Debtor listed at paragraph 10, "Other Transfers" to "unknown third party" dated July, 2001, described as: "[S]old home owned by mother of debtor but held in debtor's name[13] located at 7941 Iron Horse Blvd. West Palm Beach, Fla. For $288,000."

Paskell testified that he attended a judgment debtor examination of Paul conducted by Cossitt[14], where Paul was asked to provide additional documents. In response Paul sent Paskell Ex. 21 by facsimile. Paskell testified that he did not know who prepared Ex. 21, which purports to be Paul's handwritten cover note, a letter from John to Paul and his family dated June 7, 2001, and Monroe's letter from Monroe to Paul and Judy admitted as Ex. 8.

Creditor Patch Rubber Company ("Patch") filed an adversary complaint objecting to Debtor's discharge and for exception from discharge on September 9, 2002. Ex. 16[15] is an email from Paul to John dated September 25, 2002, in which Paul states "We are now in NZ". On

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[13]This version of events, if it is believed, raises the issue not addressed by the parties of whether the proceeds from the Iron Horse property, owned by Debtor's mother but held in Debtor's name, is property of the estate under 11 U.S.C. § 541(b)(1).

[14]Cossitt represented Patch Rubber Company in a lawsuit against the Debtor, in which Patch prevailed.

[15]The right margin of Ex. 16 is cut off. It can be discerned from Ex. 16 that an almost complete breach between the brothers occurred.

February 18, 2003, a stipulation between Debtor and Patch was approved and a judgment of nondischargeability was entered against Debtor in the amount of $275,000 under 11 U.S.C. § 523(a)(6). A Discharge of Debtor was entered on March 28, 2003.

Samson filed the complaint in the instant adversary proceeding on December 17, 2003. The summons and complaint were served on Dorothy in her nursing home, and John testified that he got them from Dorothy which was the first notice John had of Paul's bankruptcy. Ex. 24, p. 96.

The Trust was substituted for Dorothy by stipulation on October 14, 2004, after which the Trust filed its answer. The Complaint includes five (5) claims for relief based on state and federal law seeking avoidance of a transfer and judgment in the amount of approximately $266,650.33. Count I sets forth a claim for relief for actual fraud based on 11 U.S.C. § 544(b)[16] and applicable state law, MCA § 31-2-333[1](a)[17] and § 31-2-339[18]. Count II asserts a claim for

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[16]Section 544(b) provides in pertinent part that a trustee may avoid any transfer of an interest of the debtor in property "that is voidable under applicable law . . . ."

[17] Section 31-2-333(1)(a) provides: "Transfers fraudulent as to present and future creditors. (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

> (a) with actual intent to hinder, delay, or defraud any creditor of the debtor."

[18]Section 31-2-339(1) provides that in an action for relief under Part 3 ("Uniform Fraudulent Transfer Act"), a creditor may obtain: "(a) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim" along with other equitable remedies."

relief for constructive fraud under § 544(b) and MCA § 31-2-333[1](b)[19]. Count III asserts a claim under 11 U.S.C. § 547(b)[20] and § 550(a) to recover the net sale proceeds as an insider preference from the "initial transferee". Count IV asserts a claim for actual fraud under 11 U.S.C. § 548(a)(1)(A)[21]. Count V asserts a claim for constructive fraud under § 548(a)(1)(B)[22].

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[19]Section 31-2-333(1)(b) provides that a transfer is fraudulent if the debtor made the transfer or incurred the obligation:

> "(b) without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor:
> (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
> (ii) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due."

[20]Section § 547(b) permits a trustee to avoid any pre-bankruptcy transfer of a debtor's assets if the transfer: 1) is to or for the benefit of a creditor; 2) is for an antecedent debt owed by the debtor before the transfer; 3) is made while the debtor was insolvent; 4) is made within 90 days of the bankruptcy filing; and 5) enables the creditor to receive more than such creditor would have if the debtor liquidated and distributed the estate to all creditors. *In re Food Catering & Housing, Inc.*, 971 F.2d 396, 397 (9th Cir. 1992).

[21]Section 548(a)(1)(A) provides that a trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily "(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted".

[22]Section 548(a)(1)(B) provides that a trustee may avoid any transfer of the debtor or obligation incurred by the debtor within one year of the petition date if the debtor – "(B)(i) received less than a reasonable equivalent value in exchange for such transfer or obligation; and (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation; (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was a unreasonably small capital; or (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured."

Each of Plaintiff's 5 Counts remain in the Final Pretrial Order.

Over objection, Samson was permitted to give opinion testimony as an expert under Fed. R. Evid. 702 based upon his experience as a Chapter 7 trustee and his investigation in this case. Samson examined Paul, and based on his examination and investigation Samson gave his opinion that the sale proceeds were paid to Dorothy before being loaned back. On cross examination Samson testified that the sale proceeds were transferred to the Trust rather than Dorothy. Samson admitted that Paul's judgment debtor examination and §341(a) meeting testimony given under oath was not true in several respects.

Samson admitted that he had no copies of checks, no evidence of electronic transfer or paper transfer showing that Paul transferred the $266,650.33 to the Trust (or Dorothy), or from the Trust to Judy. Monroe testified there was no check written on the Trust's account to Judy for the amount of the proceeds, that the sale proceeds were not received by or come through the Trust in cash, and that he did not receive and disburse them. Samson testified that the substitution of Judy's obligation for Paul's in the amount of the sale proceeds constituted a novation, and that Paul was credited for the new loan to Judy, although he did not know if there was a bookkeeping entry showing that Paul paid the Trust or was credited by the Trust for the $266,650.33 in proceeds loaned to Judy.

Despite relying almost exclusively on Paul's statements in testifying that the sale proceeds were paid to Dorothy, Samson testified that Paul failed to list assets, transfers and creditors in his Schedules signed under oath. In particular Samson testified that Paul failed to list his beneficial interest in the Trust, failed to list the Trust as a creditor and otherwise overstated his liabilities, failed to list the loan transaction either in his Schedules or at the § 341(a) meeting,

and then Paul left the country. From Paul's omissions and flight Samson concluded that Paul is trying to hide something, demonstrating fraudulent intent. Samson gave his opinion that the transaction was fraudulent, and probably both constructive fraud and actual fraud because of Paul's concealment. He further testified that Paul was insolvent in July 2001 at the time of the loan to Judy.

On January 14, 2005, Paul wrote Patch advising it of his current address in New Zealand. Ex. 1. Ex. 15 is an email dated February 17, 2005, the heading of which states is from Judy's email account at "hotmail.com", but the message is actually from Paul to John in which Paul states, after asserting that he lost everything: "The $200,000 that came from the sale of her home was returned and then loaned to his [Paul's] wife and that is the end of the story".

Samson testified that Paul received credit or forgiveness for the amount of sale proceeds loaned to Judy. He described it as a recharacterization and novation and was not aware of any other consideration. Samson admitted under cross examination that he has never spoken with Monroe, and that he has no copies of checks to or from the Trust.

## DISCUSSION

### A. Contentions of the Parties.

Plaintiff seeks avoidance of the loan to Judy under all 5 Counts, and seeks recovery from the Trust of the sale proceeds from the Iron Horse property in the amount of $266,650.33 from the Trust on all 5 Counts. Samson contends that the Trust credited Paul's debt to the Trust when it loaned the proceeds to Judy, and that such transaction was a novation which fits within the definition of a "transfer" under all 5 Counts.

The Trust denies that a transfer occurred and argues that it never received the sales

proceeds from Paul and Judy. Monroe contended that the Trust did not loan Judy anything, that Judy never acknowledged in writing that she would pay the Trust the sale proceeds, and that Paul still owes the Trust the full amount of advances in the amount of $430,000. The Trust argues that at most there was an attempt at novation which did not result in diminution of the estate, and denies any knowledge of fraudulent intent or Paul's insolvency. Finally, the Trust asserts it acted in good faith and gave value to Paul in excess of any amount of transfer.

**B. "Transfer" – "Transferee".**

The Plaintiff avers several claims for relief based upon state and federal law §§ 544, 547 and 548, all of which share certain common elements. However, even if successful a further step is required before Samson can recover from the Trust under each of those statutes, as explained by the U.S. Court of Appeals for the Ninth Circuit:

> [T]o the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from-(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made....

11 U.S.C. § 550(a)(1). Once a transfer has been avoided under a section such as § 545, § 550 authorizes the trustee to recover the property to the extent that the transfer is avoided. See 5 Myron M. Sheinfeld et al., *Collier on Bankruptcy* ¶ 550.02 & n. 1 (Lawrence P. King ed., 15th ed.1999); *see also Acequia, Inc. v. Clinton (In re Acequia, Inc.)*, 34 F.3d 800, 809 (9th Cir.1994) ("[S]ection 550 specifies the conditions under which, once a transfer is avoided under section 544 or other provisions, a trustee can recover from various transferees.") (quoting *Lippi v. City Bank*, 955 F.2d 599, 605 (9th Cir.1992) (alteration in original)). Section 550, therefore, merely enables a trustee to recover property after a transfer has been avoided under any of the sections dealing with the trustee's avoiding powers. *See* Sheinfeld, *supra*, at ¶ 550.01[1] ("Section 550 permits a trustee (or debtor in possession), after avoidance of a transfer under the trustee's avoiding powers, to recover the property transferred or the value of the property transferred.") (footnote omitted); *see also* H.R.Rep. No. 95-595, at 375 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6331 ("Section 550 prescribes the liability

> of a transferee of an avoided transfer, and enunciates the separation between the concepts of avoiding a transfer and recovering from the transferee.").
>
> Thus, § 550 does not provide a basis for liability apart from the avoiding powers sections.

*In re America West Airlines, Inc.*, 217 F.3d 1161, 1166 (9th Cir. 2000)

The Plaintiff as Trustee has the burden of proving each and every element for avoidability of transfers under § 547(b), which is the basis of Count III. *In re Sloan*, 16 Mont. B.R. 482, 488 (Bankr. D. Mont. 1998); 11 U.S.C. § 547(g). Likewise, under § 548 and state law claims the Plaintiff has the initial burden of proof. *See, e.g., In re Acequia, Inc.*, 34 F.3d 800, 806 (9th Cir. 1994) (burden under § 548(a)(1) on the trustee until he or she establishes indicia of fraud, after which the burden shifts to the transferee). The Plaintiff's other claims for relief, like Count III, all require proving the existence not only of a transfer, but Samson must also prove that the Trust is a "transferee" in order to recover from the Trust. *In re America West Airlines, Inc.*, 217 F.3d at 1166. Rather than address Plaintiff's 5 Counts separately, the Court analyzes whether the Trustee has satisfied his burden of proof of showing that the Trust was the transferee of the Debtor's transfer. The Court concludes from below that the Trustee has not satisfied his burden.

The definition of transfer is a matter of federal law. *Barnhill v. Johnson*, 503 U.S. 393, 397, 112 S.Ct. 1386, 1389, 118 L.Ed.2d 39 (1992), citing *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369-370, 65 S.Ct. 405, 407-408, 89 L.Ed. 305 (1945), and 11 U.S.C. § 101(54) defines a transfer as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption." *In re America West Airlines, Inc.*, 217 F.3d at 1165. The definition of transfer is as broad as possible. *In re Trujillo*,

215 B.R. 200, 204 (9th Cir. BAP 1997), *aff'd.* 166 F.3d 1218 (9th Cir. 1999); *In re Feiler ("Feiler"),* 218 B.R. 957, 959 (Bankr. N.D. Cal. 1998), *aff'd* 230 B.R. 164 (9th Cir. BAP 1999), *aff'd.* 218 F.3d 948 (9th Cir. 2000). Plaintiff's state law claims, Counts I and II, include a similar broad definition of transfer at MCA § 31-2-328(12): "'Transfer' means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset and includes payment of money, release, lease, and creation of a lien or other encumbrance."

Accepting this broad definition of transfer, the Court accepts that Paul's transfer of the $266,650.33 in proceeds from the sale of the Iron Horse property to his spouse Judy was a "transfer" within the broad definition. Samson argues that the Trust is the initial or mediate transferee from the Trust of the proceeds from Paul and that the Trust subsequently loaned the proceeds, and so is liable under 11 U.S.C. § 550(a). The Court rejects Samson's opinion testimony that Paul paid the proceeds to the Trust or to Dorothy.

Samson had no personal knowledge and offered no evidence that the proceeds were paid to the Trust other than statements by Paul. John and Monroe both testified that the Trust did not receive the sale proceeds. The Court had the opportunity to observe Monroe's demeanor while testifying under oath and cross examination, and the Court finds that Monroe is a credible witness. *In re Taylor*, 514 F.2d 1370, 1373-74 (9th Cir. 1975); *See also*, *Casey v. Kasal*, 223 B.R. 879, 886 (E.D. Pa. 1998). Monroe's testimony is corroborated not only by that of John but also by the Trust's records admitted at trial which showed Paul never paid the Trust the proceeds. Samson's testimony that Paul paid the proceeds to the Trust is based solely on Paul's statements, and Paul's credibility is a different story.

The Court liberally permitted Samson to testify as an expert and give his opinion that the transaction between Paul and his spouse was a preferential and fraudulent transfer, and that Paul paid the proceeds to the Trust. The determination of the weight to be given expert testimony or evidence is a matter within the discretion of the trier of fact – which in a bench trial like the instant adversary proceeding is the bankruptcy court. *Fox v. Dannenberg*, 906 F.2d 1253, 1256 (8th Cir. 1990); *Arkwright Mutual Insurance Co. v. Gwinner Oil Inc.*, 125 F.3d 1176, 1183 (8th Cir. 1997); Barry Russell, *Bankruptcy Evidence Manual*, 2000 Ed., § 702.2. Samson is not disinterested in the outcome since he is the Plaintiff. However, disintestedness is not required of expert witnesses any more than it is required of ordinary witnesses, and Samson's interest is merely another matter that goes to the weight of his testimony. *In re Ostrom-Martin, Inc.*, 191 B.R. 126, 135 (Bankr. C.D. Ill. 1996), *aff'd.*, *Barber v. Golden Seed Co., Inc.*, 129 F.3d 382 (7th Cir. 1997).

The weight given Samson's opinion is undermined by Samson's reliance on Paul's representations, and the Court takes note of Paul's lack of credibility. Paul and Judy were paid the $266,650.33 net from the closing. Ex. 6. Those proceeds were transferred directly to Judy, without being paid to the Trust, and Paul and Judy then moved to New Zealand where they are unavailable for trial. Before fleeing Paul was the subject of a judgment debtor examination by Patch, at which Paul threw Patch off the scent by stating under oath, falsely that he paid the proceeds to his mother. Samson testified that Paul demonstrated fraudulent intent by concealing assets and creditors in his Schedules, testifying falsely at the § 341(a) meeting of creditors, and leaving the country. In Adversary Proceeding No. 02/00104, Paul consented to entry of judgment against him in the amount of $275,000 under Count II based upon 11 U.S.C. § 523(a)(6), which

excepted from his discharge said amount for a willful and malicious injury. Once safely in New Zealand with Judy and the proceeds, after enumerating his grievances with his mother and brother, Paul repeated his statement on Ex. 15 that the $200,000 from the sale of the home "was returned and then loaned to his wife".

As John noted on Ex. 24 at pp. 88-89, Paul's position has changed and he now says that he does not owe the Trust anything because his mother broke the original agreement when she moved back to Kansas. In short, the Court finds and concludes that Paul is not credible, and the evidence that he is not credible is overwhelming. To the extent Samson's opinion relies on Paul's statements that the $266,650.33 in sale proceeds were paid to the Trust, which is the only evidence Samson offered that the Trust received the money, the Court assigns little probative weight to Samson's opinion testimony, woefully insufficient to satisfy his burden of proof. The Court finds based on Monroe's and John's testimony and the Trust records that the Trust never received the $266,550.33 in proceeds from the sale of the Iron Horse property.

Next, the Court considers whether the Trust, rather than just Judy, was a "transferee" from whom the Plaintiff may recover based on the alleged loan. Section 550 clearly provides for recovery from "the initial transferee ... or the entity for whose benefit the transfer was made or ... any immediate or mediate transferee". §§ 550(a)(1) & (2) (emphasis added). *In re Richmond Produce Co., Inc.*, 195 B.R. 455, 463 (N.D. Cal. 1996); *In re Skywalker, Inc.*, 155 B.R. 526, 530, 12 Mont. B.R. 452, 460-61 (9th Cir. BAP 1993), *aff'd.*, 49 F.3d 546, 549 (9th Cir. 1995). The Bankruptcy Code does not define the terms "initial transferee", "immediate transferee" and "mediate transferee". Generally the party who receives a transfer of property directly from the debtor is the initial transferee. *In re Incomnet, Inc.*, 299 B.R. 574, 578 (9th Cir. BAP 2003); 5

Lawrence P. King, COLLIER ON BANKRUPTCY, ¶ 550.02[4][a] (15th Ed. 2002). Under that general definition, in the instant case, all the evidence shows that Judy is the transferee of the $266,650.33 in proceeds from the sale of the Iron Horse property. Judy was named in the closing document as seller, and according to all the evidence Judy ended up with the proceeds. Judy is in New Zealand and not a party in this adversary proceeding. No evidence exists in the record that the Trust ever received any of the proceeds, and substantial credible evidence exists in the record that the Trust did not receive any proceeds and remains owed by Paul for the full amount of advances. Thus, the Trust's status as a transferee under § 550(a), if anything, can only be as a mediate or immediate transferee by virtue of the alleged loan transactions.

**C. *In re Feiler*.**

Samson cites *In re Feiler*, 218 F.3d 948 (9th Cir. 2000), as authority for finding a transfer even though no physical transfer of the proceeds occurred between Paul and the Trust. In *Feiler*, the debtors elected to waive a carryback provision of federal tax law governing net operating losses ("NOLs") and to carry the NOLs forward to be applied against their income in future tax years. *Id.* at 950-51. After they filed a bankruptcy petition the trustee filed income tax refund requests on behalf of the estate for refunds the Feilers would have been entitled to had they not elected to carry forward their NOLs. *Id.* When the Internal Revenue Service ("IRS") denied the estate's claims for refunds on the grounds the debtors' election was irrevocable, the trustee brought an adversary proceeding seeking to avoid the debtors' election to carry forward as a fraudulent transfer under § 548. *Feiler*, 218 F.3d at 951. The bankruptcy court granted the trustee summary judgment, and both the BAP and the Ninth Circuit affirmed. *Id.* at 951, 956–57. The Ninth Circuit disagreed with the IRS's contention that no property interest was transferred,

noting that when the Feilers elected to relinquish their immediate tax refund in exchange for future tax considerations, a transfer occurred for purposes of § 548 when the IRS traded one obligation, an immediate tax refund, for another. *Feiler*, 218 F.3d at 956.

*Feiler* is distinguishable in several respects from the instant case. First, unlike the IRS in *Feiler,* the Trust owed no obligation to Paul, either before or after the proceeds were transferred to Judy. Second, Paul owed the Trust almost $430,000[23]. After the "transfer" of proceeds by Paul to Judy[24], Paul continued to owe the Trust the full amount. No trading of obligations between Paul and the Trust are shown by the evidence in the instant case comparable to that shown in *Feiler*, in which as a result of the Feilers' election to waive carryback of NOLs the IRS was relieved of its immediate obligation to pay the Feilers $287,493 in tax refunds. *Id.* at 956. The Trust received no comparable relief from liability, or anything else of value from Paul, and the amount of debt Paul owed the Trust for advances was the same before and after the transfer according to Monroe's uncontroverted testimony, with which John ultimately agreed. *Feiler* provides no authority to support the Plaintiff's claims that the Trust received or made a transfer of funds from Paul. Paul simply gave the $266,650.33, or a portion thereof[25], in sale proceeds already in his possession to his spouse, Judy, and continued to enjoy the use of those funds with her when they moved to New Zealand, while steering his pursuers in pursuit of his mother's Trust to recover the funds.

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[23]The amount of reduction for Paul's limited life care of his mother is not relevant.

[24]Both Paul and Judy owned the Florida property, and without consideration of contribution, both may be entitled, based solely on the titled ownership, to a portion of the sale proceeds.

[25]See n. 24.

**D. Dominion or Control.**

The evidence shows that Paul decided to transfer the sale proceeds, or a portion thereof, to Judy, and suggested to John that it be considered a loan to Judy, and John agreed. Ex. 24, p. 102. John testified that he agreed, but that he knew his mother Dorothy would not agree to loan Paul more money, Ex. 24, pp. 102-03. John testified that he saw the handwriting on the wall and believed Paul had no intention of paying back the Trust, and John wanted to protect his mother and the Trust. Ex. 24, pp. 56, 78-79, 82-83. With that background, John admitted that he authorized the $266,650.33 amount of proceeds to be a loan in Judy's name by the Trust. Ex. 24, pp. 68, 73, 79, 88. However, Monroe, who is sole administrator of the Trust, was not made aware of John's arrangement with Paul until June of 2002, and he testified that the Trust neither approved nor made any loan to Judy, and no loan is reflected in the Trust's records. Monroe and John both concluded that Paul continues to owe the entire amount of $430,000 notwithstanding John's agreement with Paul and Judy, and none of Paul's debt was forgiven. Ex. 24, pp. 81-82; Ex. 8. No new cash was transferred by the Trust to Judy. Ex. 24, p. 88.

Ultimately Monroe's viewed prevailed within the Trust, as the Trust records list no loan to Judy, rather just a parenthetical notation that "(Paul says amount owing is from Judy and in amount of $266,650)". Monroe is co-trustee of the Trust, a CPA, and the Trust's sole administrator and custodian of records. While the Trust documents, Ex. A, authorize trustees the discretion to lend money, that discretion is limited not only by the presence of a co-trustee, but also the limitation that during Dorothy's life the Trust's purposes are limited to pay Dorothy income, or sums she requests in writing, or to pay Dorothy such sums as the trustees determine to be reasonably necessary for her support, maintenance or other benefit. The questions of whether

John had the authority and discretion under the Trust instruments to loan money to Judy, outside of the enumerated trustee powers while Dorothy was living, and without notice or consent of the co-trustee Monroe, would have to be decided according to Kansas law. This Court does not reach those questions, however, both because Paul and Judy failed to follow through with their agreement with John to provide Judy's written agreement to repay the money, as will be discussed below, but more importantly because the Trust never exercised dominion or control over the $266,650.33 proceeds.

Some courts adopt a "conduit rule" for a situation such as when a bank receives a check, wire transfer, etc., from the debtor, with instructions to pass it along to another transferee, in which instance courts tend to immunize the bank from liability under § 550 as an "initial transferee" because it never exercised any control over the Debtor's funds. *In re International Administrative Services, Inc.*, 408 F.3d 689, 705 (11th Cir. 2005); *see In re Auto-Pak, Inc.*, 63 B.R. 321 (Bankr.D.D.C.1986), *rev'd on other grounds*,73 B.R. 52 (D.D.C.); *Robinson v. Home Sav. of Am.* 94 B.R. 180 (Bankr. C.D. Cal. 1988). The Ninth Circuit in *In re Bullion Reserve of North America ("Bullion")*, 922 F.2d 544, 548-49 (9th Cir. 1991) adopted the Seventh Circuit's reasoning that the minimum requirement for status as a transferee is "*dominion over the money or other asset, the right to put the money to one's own purposes*", and the Ninth Circuit paraphrased that "an entity does not have 'dominion over the money' until it is, in essence, 'free to invest the whole [amount] in lottery tickets or uranium stocks'." *Bullion*, 922 F.2d at 549, quoting *Bonded Fin. Servs. v. European Am. Bank*, 838 F.2d 890, 893-94 (7th Cir. 1988) (emphasis in original). In this Court's view, Plaintiff fell far short in the instant case of satisfying his burden of showing that the Trust ever had dominion over the $266,650.33 in proceeds from the sale of the Iron

Horse property, to a degree sufficient to consider the Trust a transferee.

The "dominion or control test" "requires courts to step back and evaluate a transaction in its entirety to make sure that their conclusions are logical and equitable." *Bullion*, 922 F.2d at 549, quoting *Nordberg v. Societe Generale (In re Chase & Sanborn Corp.*), 848 F.2d 1196, 1199 (11th Cir. 1988); *Incomnet*, 299 B.R. at 580. "This approach is consistent with the equitable concepts underlying bankruptcy law.... [T]he general approach ... applies regardless of whether a court is attempting to determine whether a debtor controlled the transferred funds it transferred to a defendant or a defendant gained control over the funds transferred to it." *Bullion*, 922 F.2d at 549, quoting *In re Chase & Sanborn Corp.*, 848 F.2d at 1199. The court went on to note that it would be "inequitable" to allow recovery against an entity merely because it had "technically ... received the funds ...," if the entity had "never actually *controlled* the funds." *Bullion*, 922 F.2d at 549, quoting *Chase & Sanborn*, 848 F.2d at 1200 (emphasis in original).

Applying the "dominion or control" reasoning adopted in *Bullion* to the evidence admitted in the instant case is fatal to each of the Plaintiff's 5 Counts against the Trust based on state and federal fraud, constructive fraud, and preference statutes, because the evidence clearly shows that the Trust never "actually controlled" the $266,650.33 proceeds from the sale of the Iron Horse property. Further, in this Court's view it would be inequitable to award the Plaintiff a recovery of $266,650.33 from the Trust in these circumstances.

The BAP in *Incomnet* distinguished *Bullion* and did not apply the control test because in *Incomnet* the transfer did not involve a two-step transaction. *Incomnet*, 299 B.R. at 580. In the instant case the only way the Plaintiff could prevail is if the Court found a two-step transaction involving the funds transferred to the Trust and then loaned to Judy. If only one step is involved, the evidence shows that the proceeds were retained by Judy and Paul and the Trust must prevail.

If a loan is added then it becomes a two-step transaction rather than one-step as in *Incomnet*, in which case *Bullion* and *Bonded* apply and the Trust must prevail because it never had actual control of the $266,650.33 sale proceeds. John agreed to consider it a loan to Judy only because he believed Paul never intended to repay the Trust, and he thought that the Trust's only chance to recover would be if it obtained Judy's signature, which it never did. The Trust never had dominion and control over the $266,650.33 in proceeds, and the evidence shows that Dorothy would not have loaned that money back to Paul if the Trust ever had received the proceeds. Ex. 24, pp. 72-73 ("Paul asked would mom loan him that money. And I said no. There is no way my mother would have loaned him that money."). If the Trust ever had obtained actual control of the $266,650.33 in sale proceeds, it would have been reflected in the Trust's records maintained by Monroe and he would have ensured that any loan to Judy was documented and enforceable.

**E. Novation.**

The Plaintiff argues that the agreement between John and Paul's spouse, Judy, for her to be liable for the $266,650.33 proceeds as a loan, constituted a novation which somehow makes the Trust liable to the estate. Since the Trust received no funds from Paul and received nothing in writing from Paul's spouse, such a result does not appear to fall within the logical and equitable requirements under the *Bullion* and *Bonded* decisions cited above. Moreover, the Trustee's argument fails under application of state law defining both novation or other enforceable promise.

Novation is the substitution of a new obligation for an existing one. MCA § 28-1-1501. MCA § 28-1-1502 defines three ways in which a novation can occur:

Kinds of Novation. Novation is made by the substitution of:

(1) a new obligation between the same parties with intent to extinguish the old obligation;

(2) a new debtor in place of the old one with intent to release the latter; or

(3) a new creditor in place of the old one with intent to transfer the rights of the latter to the former.

*Tvedt v. Farmers Ins. Group of Companies*, 2004 MT 125, ¶ 42, 321 Mont. 263, ¶ 42, 91 P.3d 1, 10, ¶ 42. In *Tvedt* the Montana Supreme Court repeated its long standing rule that "novation can never be presumed":

> In order to effect a novation there must be a clear and definite intention on the part of all concerned that such is the purpose of the agreement, for it is a well-settled principle that novation is never to be presumed ...; the point in every case, then, is, did the parties intend by their arrangement to extinguish the old debt or obligation and rely entirely on the new, or did they intend to keep the old alive and merely accept the new as further security, and this question of intention must be decided from all of the circumstances.

*Tvedt,* 2004 MT 125, ¶ 43, 321 Mont. 263, ¶ 43, 91 P.3d 1, 10, ¶ 43, quoting *Waite v. Andreassi* (1991), 249 Mont. 149, 149, 813 P.2d 987, 988 (emphasis added) (citing *Harrison v. Fregger* (1930), 88 Mont. 448, 454, 294 P. 372, 373).

Since novation can never be presumed, Samson has the burden to prove by a preponderance of the evidence that (1) a new obligation is substituted between the same parties with intent to extinguish the old obligation, or (2) a new debtor is substituted in place of the old one with intent to release the latter; or (3) a new creditor is substituted in place of the old one with intent to transfer the rights of the latter to the former. Samson failed to show that Judy's verbal promise to pay was made with the intent to extinguish the old obligation, or to release Paul. Indeed, the only credible evidence in the record is both Monroe's testimony and John's testimony that Paul's obligation for the $430,000 advances from the Trust was not extinguished, that Paul

still owes the entire obligation to the Trust. Ex. 24, pp. 40, 66, 72-73, 83-84. Nothing exists in writing as part of the record from Judy evidencing the obligation. Ex. 24, p. 79. Samson failed to show that Judy's promise to pay was made with the intent to extinguish the old obligation because both Monroe and John testified that the old obligation owed by Paul was not forgiven by the amount of the proceeds loaned to Judy. Ex. 24, pp. 81-84. The Trust's records corroborate that testimony that Paul continues to owe the full amount. Ex. I, 8, 19. Thus, the Plaintiff failed to show either an intent by the Trust to replace the old obligation, which Paul continues to owe, or to release Paul. Third, no evidence in the record indicates a new creditor. Since novation may not be presumed and Samson failed his burden to show clear and definite intention on the part of all concerned that a novation occurred as required under MCA § 28-1- 1502[26], the Court concludes that the requirements for novation have not been satisfied. *Tvedt,* 2004 MT 125, ¶ 43, 321 Mont. 263, ¶ 43, 91 P.3d 1, 10, ¶ 43.

With the elements of novation not being satisfied, the Court turns to whether Judy's verbal promise to repay the $266,640.33 is otherwise an enforceable promise or transfer. In *In re Galbreath*, 286 B.R. 185, 199-201 (Bankr. S.D. Ga. 2002), the bankruptcy court construed a debtor's oral promise to pay an obligation as within the Georgia statute of frauds and not subject to any applicable exception. Montana defines guaranty as a "promise to answer for the debt,

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[26]The result would not change if the Court instead considered Kansas' law of novation, which requires: (1) a previous valid contract; (2) agreement on a new contract; (3) validity of that new contract; and (4) intent to extinguish the old contract and substitute the new. *Barbara Oil Co. v. Kansas Gas Supply Corp.*, 250 Kan. 438, 454, 827 P.2d 24, 36 (1992); *Elliott v. Whitney*, 215 Kan. 256, Syl. ¶ 1, 524 P.2d 699 (1974). Samson failed to show elements (2), (3), and (4) of the Kansas elements for novation.

default . . . of another person.". MCA § 28-11-101. Except as provided in MCA § 28-11-105, "a guaranty must be in writing and signed by the guarantor, but the writing need not express a consideration." MCA § 28-11-104. Judy's promise to repay the Trust comes within Montana's definition of guaranty, and so must be in writing unless one of the conditions of MCA § 28-11-105 applies. Section 28-11-105 provides:

> When guaranty considered original obligation and need not be in writing. A promise to answer for the obligation of another in any of the following cases is deemed an original obligation of the promisor and need not be in writing:
>
> (1) where the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such promise or by one who has received a discharge from an obligation, in whole or in party, in consideration of such promise;
>
> (2) where the creditor parts with value or enters into an obligation in consideration of the obligation in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the principal debtor and the person in show behalf it is made his surety.
>
> (3) where the promise, being for an antecedent obligation of another, is made upon a consideration:
>
> > (a) that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor;
> >
> > (b) that the party receiving it releases the property of another from a levy; or
> >
> > (c) beneficial to the promisor, whether moving from either party to the antecedent obligation or from another person;
>
> (4) where a factor undertakes to sell merchandise for a commission and guarantee the sale;
>
> (5) where the holder of an instrument for the payment of money upon which a third person is or may become liable to him transfers it in payment of a precedent debt of his own or for a new consideration and in connection with such transfer enters into a promise respecting such instrument.

Reviewing the facts above, this Court finds that the Trustee failed his obligation to show, by a preponderance of the evidence, that any of the exceptions of MCA § 28-11-105 apply to Judy's verbal promise to pay the Trust the $266,650.33 in proceeds from the sale of the Iron Horse property. Paul continued to owe the Trust the full amount of advances and was not released by Judy's promise. Under *Galbreath*, 286 B.R. at 199-201, and Montana law, Judy's verbal promise to pay the $266,650.33 comes within the Montanan statute of frauds. With no exception from MCA § 28-11-105 applying, MCA § 28-11-104 applies and Judy's promise to pay "must be in writing and signed." Judy never provided the Trust with a signed writing satisfying Montana's statute of frauds, and therefore the loan is not enforceable. The Trustee failed to satisfy his burden to show novation or any other enforceable promise.

**F. Other Elements**.

The facts recited above, and the Plaintiff's failure to satisfy his burden to show that the Trust was a transferee, also afflict Plaintiff's claims to recover on fraudulent transfers based on actual and constructive fraud. The only transfer, as shown above, was between Paul and his spouse. The Court concludes with confidence that the burden of showing fraudulent intent by Paul has been met. But the Trust was as much a victim as the estate of Paul's machinations, and the fact remains that the Trust never received or had actual control of the $266,650.33 proceeds from the sale of Iron Horse property, and the Trust records reflect only some promise that Judy would repay that portion of Paul's entire debt. In fact Paul never really relinquished control of the proceeds, the benefits of which in all likelihood accompanied him and Judy to New Zealand. While evidence exists that Dorothy would have agreed to loan funds to Judy, the Trust would not loan funds to Paul and considers Paul to owe the full amount of advances in the sum of $430,000.

Samson had to show that the Trust received something of value from Paul in order to satisfy his burden of proof under § 547(b)(5), § 548(a), § 544(b) and MCA § 31-2-333(1)(a) and (b), where value is also a required element. Samson failed to show that anything of value passed from Paul to the Trust based upon Judy's verbal promise. Under § 550(a), the Plaintiff would be able to recover from the Trust only the value of such property received by the Trust under all 5 Counts, which means only the value of Judy's unwritten, unenforceable promise to pay the Trust the $266,650.33 which Ex. 6 shows she and Paul received at the closing and kept. The Court views the recoverable value of that promise as nil.

**CONCLUSIONS OF LAW**

1. This Court has jurisdiction of this adversary proceeding under 28 U.S.C. § 1334.

2. This is a core proceeding to recover preference and fraudulent conveyances under 28 U.S.C. § 157(b)(2)(F) and (H).

3. The Plaintiff failed to satisfy his burden of proof by a preponderance of the evidence to show that the Defendant Dorothy M. Schmersey Trust is a "transferee" under 11 U.S.C. § 550(a) from the Debtor of $266,650.33 in proceeds from the sale of real property, when the proceeds were transferred by the Debtor to his spouse, the Debtor continues to be liable to the Trust for proceeds and the full amount of advances made by the Trust to him, the Trust never had actual control of the proceeds, and evaluation of the transaction in its entirety leads the Court to conclude that awarding judgment against the Trust would be neither logical nor equitable. *In re Bullion Reserve of North America*, 922 F.2d 544, 549 (9th Cir. 1991), quoting *Nordberg v. Societe Generale (In re Chase & Sanborn Corp.*), 848 F.2d 1196, 1199 (11th Cir. 1988).

4. The Plaintiff failed to satisfy his burden of proof to show clear and definite intention

to effect a novation, and failed to show the elements of novation or other enforceable promise based upon Judy Schmersey's unwritten promise to pay the Defendant the $266,650.33 in sale proceeds.

**IT IS ORDERED** in conformity with the above, a separate Judgment shall be entered in favor of the Defendant Dorothy M. Schmersey Trust dismissing the Plaintiff's complaint filed in this adversary proceeding.

BY THE COURT

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana